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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962

No. 230

LEE WEI FANG, WANG SIANG-KEN, ET AL.,
Petitioners,

v.

ROBERT F. KENNEDY, ATTORNEY GENERAL OF THE UNITED STATES

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

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Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit affirming judgments of the District Court.

Opinions Below

The opinion of the Court of Appeals has not yet been reported and is set forth in the Appendix at pp. 19-31. The District Court filed no opinion. Its judgments are set forth at pp. 38-39 of the Appendix.

Jurisdiction

The judgment of the Court of Appeals was entered on March 25, 1963. Jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

Questions Presented

1. Whether deportation may be directed to the Republic of China as the country of which petitioners are subjects, nationals, or citizens where it appears:

(a) That the administrative findings, based upon pleadings and evidence in the deportation proceedings, establish that petitioners are natives and citizens of China;

(b) That the references in such administrative proceedings to "China" were intended to mean the mainland of China, including its Communist government, and now occupied by the People's Republic of China;

(c) That no evidence was adduced during such proceedings to establish either the nationality laws of the Republic of China or that petitioners are in fact citizens or nationals of that country;

(d) That petitioners have alleged that they are in fact nationals and citizens of the People's Republic of China.

2. Whether the District of Columbia Circuit may construe the term "China" in the administrative findings to mean "Republic of China" and bar the petitioners from an opportunity to establish that they are in fact not citizens of the Republic of China where it appears that the Immigration and Naturalization Service, the Second Circuit, as well as earlier decisions of the District of Columbia Circuit, had all previously accepted the term "China" to refer to the Chinese mainland occupied and governed by the People's Republic of China, and where it appears that petitioners had no notice of the intended construction adopted here until after the hearings in the deportation proceedings had been closed.

3. Whether the administrative findings, as construed by the Court of Appeals, are supported by reasonable, sub-

stantial, and probative evidence of citizenship in the Republic of China where it appears that the proof of such citizenship has been derived by the reviewing court from "certified administrative files", and is based largely upon statements by the petitioners that they do not wish to return to Communist China and upon the fact that they have left the jurisdiction of that country, but without evidence of the effect of such conduct upon their nationality under either the municipal law of the People's Republic of China or of the Republic of China.

4. Whether the District of Columbia Circuit may, as a court of equity, decline to review petitioners' claims that the Attorney General's directives that they be deported to Formosa and to Hong Kong are not in conformity with Section 243(a) of the Immigration and Nationality Act, for failure to ascertain whether the country of their citizenship, which they claim is the People's Republic of China, is willing to accept them, upon the ground that they do not in fact wish to be deported to that country.

Statute Involved

Section 243(a) of the Immigration and Nationality Act, 66 Stat. 163, 212 [8 U.S.C. 1253(a)], provides in pertinent part:

> "Thereupon deportation of such alien shall be directed to any country of which such alien is a subject, national, or citizen if such country is willing to accept him into its territory * * *."

Statement

Petitioners are each aliens who have been ordered deported from the United States for having overstayed their leave to remain in this country (R. 9, 100). None of them designated the country to which they wished to be deported

(R. 125). Pursuant to Section 243(a) of the Immigration and Nationality Act, 66 Stat. 212, 8 U.S.C. 1253(a), their deportation must be directed to the country of which they are subjects, nationals, or citizens, if that country is willing to accept them into its territory, before deportation is sought elsewhere.

It was established during their deportation proceedings by their own admissions that each petitioner was born on the mainland of China and is a national or citizen of "China". No evidence was taken in any of the proceedings regarding citizenship in the "Republic of China", nor was evidence elicited or determination made, during the proceedings to establish the meaning of the term "China". Neither was there evidence introduced to establish the nationality law of the "Republic of China" or of "China" (R. 13-89). Findings were entered by the special inquiry officers who conducted the various deportation hearings that each petitioner is a "native and citizen of China" (R. 18).*

Thereafter, without notice to the petitioners, the Immigration and Naturalization Service inquired of the Republic of China whether the government of that country would be willing to accept the petitioners into its territory (R. 19). That country declined to accept the aliens in *Lee Wei Fang, et al.* v. *Kennedy* in the case below (R. 19). However, it indicated its willingness to accept on Taiwan (Formosa) the aliens in *Wang Siang-Ken, et al.* v. *Kennedy* below, and it advised the Immigration and Naturalization Service, *ex parte*, that passports would be issued for each of the latter group of aliens. The Service then inquired of the British Crown Colony of Hong Kong whether the

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* The administrative records relating to the pleadings, evidence, and findings relating to this issue are set forth at R. 12-20 for Lee Wei Fang, only, inasmuch as his is typical of all the cases.

government of that country would accept petitioners whom the Republic of China had declined. The British Crown Colony indicated that it was willing to receive the remaining petitioners at Hong Kong (R. 10, 11, 20).

In due course, the Immigration and Naturalization Service directed the deportation of petitioners in the *Lee Wei Fang* case to Hong Kong, and those in the *Wang Siang-Ken* case to Formosa (R. 2, 20, 94), described variously in the notices given to the petitioners for the first time as "Taiwan", "Formosa" or "The Republic of China on Formosa" (R. 2, 10, 94).

Each of the petitioners then brought actions in the District Court below to obtain judgments that the Attorney General may not deport him to the country directed (R. 2, 94). Each petitioner alleged that he was born in China, that he is a native of China and a subject, national and citizen of the People's Republic of China; that he is not a subject, national or citizen of the Republic of China; that no administrative findings were made that he is a subject, national or citizen of the Republic of China; that the Attorney General neither directed his deportation to the People's Republic of China, as the country of which he is a subject, national or citizen, nor attempted to ascertain whether the government of that country would accept him into its territory.

In addition, the petitioners in *Lee Wei Fang* alleged that none of them is a subject, national, or citizen of Hong Kong, and those in *Wang Siang-Ken* alleged that none of them is a subject, national, or citizen of Formosa (R. 4, 95).

No answers were filed by the Attorney General below. Instead he moved, as did petitioners, for summary judgment based upon the administrative records relating to each petitioner (R. 4, 6, 96). Those records, so far as relevant here, establish the allegations of the petitioners that ad-

ministrative findings had been made that each of them is a "native and citizen of China", but that there was neither evidence in the deportation proceedings nor findings that any of them is a subject, national or citizen of the Republic of China; that, nonetheless, the Attorney General attempted to effect deportation of the petitioners to that country (R. 12-89).

In his Statement of Material Facts and in his Statement in Opposition to Plaintiffs' Motion in the District Court, the Attorney General did not dispute the absence of evidence or findings that the petitioners are nationals of the Republic of China (R. 8, 9). Rather, he asserted for the first time anywhere that the "Administrative finding that plaintiff is a native and citizen of China refers to the Chinese Nationalist Republic, the government of which is now situate on Formosa" (R. 8).

Petitioners' allegation that they are subjects, nationals, or citizens of the People's Republic of China was met with the "legal postulate" that within the meaning of Section 243, of the Immigration and Nationality Act, 8 U.S.C. 1253(a), they are citizens of the "Chinese Nationalist Republic" because the United States recognizes that government and not "the Chinese Communists' seizure of the mainland of China" (R. 10).

Summary judgments were entered for the Attorney General (R. 123).

On appeal to the United States Court of Appeals for the District of Columbia Circuit the judgments were affirmed by a divided court (R. 124-144).

The majority opinion held that the administrative findings that the petitioners are "natives and citizens of China" are properly construed as findings that they were natives and citizens of the Republic of China" (R. 127

128). This determination is not made, the Court declared, "exclusively by the geographical spot where one was born, but * * * political matters must be considered. In the case of citizens of China, for the purposes of deportation from the United States, they are properly regarded as citizens of the government of their country which the United States recognizes, at least in the absence of a showing that they in fact support and give allegiance to the government not recognized by the United States" (R. 130).

The Attorney General's determination, the lower court held "is fully supported by the facts appearing in the certified administrative files"[1] (R. 133). Those facts as set forth by the Court are that (1) the petitioners "although offered the opportunity to name the place where they wished to be deported (did not choose) the mainland of China * * * (and a number) indicated affirmatively that they did not choose to go there"; (2) some petitioners were "in possession of passports issued by the Republic of China"; others had "entered the United States as seamen on ships flying the flag of the Nationalist Government"; (3) "* * * all had voluntarily left the mainland and the jurisdiction of Red China" (R. 133-134).

"The Attorney General was certainly warranted in concluding on these facts alone" the Court of Appeals stated, that (those petitioners to be deported to Formosa) "bore allegiance to and regarded themselves as citizens of the Republic of China rather than of Communist China" (R. 135).

As to the petitioners who were declined by the Republic of China and thereafter ordered deported to Hong Kong,

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[1] Such "files" are to be distinguished from the deportation proceedings, which are of record. Cf. 8 C.F.R. 243.1 (1958 ed.) with 8 C.F.R. 242a, 242.15, 1962 supp.

the Court of Appeals found (1) that two had stated under oath that they were citizens of the Republic of China; (2) that nine others had "indicated to the Immigration and Naturalization Service that they adhered to the principles of the Government of Free China"; (3) that still other petitioners had stated that they did not want to be returned to the Chinese mainland; (4) that six petitioners, "those who did not affirmatively indicate adherence to Nationalist China and who did not affirmatively state that they did not wish to be returned to the mainland * * *", held either Hong Kong Seaman's Identity Books, or a Hong Kong Seaman's Discharge Book. "In the absence of anything else, the conclusion is inescapable that those with Hong Kong papers", the Court declared, "had escaped to or gone to Hong Kong, that they do not regard themselves as citizens of Red China * * *" (R. 134-135).

The one remaining petitioner, not accounted for in the above summary, had entered the United States on a visitor's visa. As to him, the Court of Appeals stated, "Although the file before us does not indicate where the visitor's visa was granted, the Attorney General could fairly assume—if he did not possess positive information—that it was obtained in Hong Kong (since Taiwan did not accept him) and therefore that he had severed himself from adherence to Red China" (R. 136).

As a further ground for its holding, the Court of Appeals declared that the petitioners "are in no position to ask relief from a court of equity" because they "do not desire to be deported to Communist China, and would resist any such action if it were ordered" (R. 137-138).

The dissenting opinion (Wright, J.) urged that the petitioners were entitled to a "hearing with findings supported by evidence in the record" on the question of the country to

which they are to be deported. The dissent did not agree that records in these cases support a finding that the petitioners are subjects, nationals or citizens of Nationalist China, observing that there is little evidence in the records on this question beyond the admissions that the petitioners were born on the mainland of China and that they are citizens of China. "The fact that many of the deportees express dislike for, and fear persecution by, the Communist government", Judge Wright noted, "* * * is not an acknowledgment of allegiance to the Nationalist Government" (R. 140).

"There is no proof as to the 'China' the (petitioner) or the Special Inquiry Officer had in mind * * *. There is in the record no evidence whatever as to the municipal law of Nationalist China. Consequently, we are uninformed as to whether, under the law of that country, these aliens, in particular, are subject nationals or citizens thereof, or whether, in general, Nationalist China claims as subject nationals or citizens all persons born on the mainland. Under these circumstances", Judge Wright's dissent states, "* * * the conclusion that these (petitioners) are subject nationals or citizens of Nationalist China it not only without support in the record, but is likewise without support in the findings themselves" (R. 140-142).

With regard to the majority's view that the Republic of China must be held to be the country of the petitioners' citizenship because it is the government "which the United States recognizes" (R. 130), the dissent observed that "Time and again the Department of Justice has attempted to deport aliens born on the mainland to Communist China" (R. 142).

Nor did the dissent agree that petitioners could not seek relief from a court of equity. "Congress * * * did not

give the Executive an unrestricted hand in the deportation of aliens", Judge Wright declared, "* * *" Their effort to assert whatever rights they may have under the Immigration and Nationality Act of 1952 can[not] preclude consideration of their application to a court of equity for enforcement of due process of law" (R. 144).

Reasons for Granting the Writ

The decision below raises three important questions affecting proceedings for the deportation of aliens from the United States.

I

The first is whether the administrative findings are sufficient here to support the directives that the petitioners be deported to the Republic of China. None can doubt that the requisite finding, upon which the orders of deportation are bottomed, that the petitioners are "citizens and natives of China" is so ambiguous that it is uncertain whether it is intended to refer to that China known as the Republic of China, which is located on Formosa; or to that China known as the People's Republic of China, which occupies the Chinese mainland.

The administrative use of the term "China" has been construed variously by the Courts. The Second Circuit in *United States ex rel. Tom Man* v. *Murff*, 264 F. 2d 926, 928 (1959), took the term to mean, as did the Immigration and Naturalization Service, the mainland of China. See also *Leong Leun Ho* v. *Kennedy*, 309 F. 2d 467, concurring opinion, 475 (2nd Cir., 1962). So too has the District of Columbia Circuit in earlier cases. See *Rogers* v. *Lu*, 104 U.S. App. D.C. 374, 262 F. 2d 471, affirming *Lu* v. *Rogers*, 161 F. Supp. 320 (D. D.C., 1958); and *Chien Chan Chu* v. *Brownell*, 101 U.S. App. D.C. 204, 247 F. 2d 799 (1957). Yet, in the decisions below, relying upon a statement in its

opinion in *Dai Ming Shih v. Kennedy*, 111 U.S. App. D.C. 380, 297 F. 2d 791 (1961), cert. denied 369 U.S. 844 (1962), where the issue here was not raised (297 F. 2d at 792), the lower court has construed "China" to mean "Republic of China".

If the courts have had divergent constructions of the term "China", the Immigration and Naturalization Service has not. For until the post litem motam contention below that "'China' refers to the Chinese Nationalist Republic, the government of which is now situate on Formosa" (R. 8), the Immigration and Naturalization Service had consistently used the term "China" to refer to the Chinese mainland and had relied upon the terms "Republic of China on Formosa", "Formosa" or "Taiwan" when referring to the entity governed by the Republic of China (R. 66, 67, 105, 109, 110, 118, 122).

That the District of Columbia Circuit adopted a questionable method to determine the meaning of the term "China" seems plain. It is in conflict with the fixed principles which guide the judicial review of administrative decisions: "We must know what a decision means before the duty becomes ours to say whether it is right or wrong", *United States v. Chicago, Milwaukee, St. Paul & Pacific Railroad Co.*, 294 U.S. 499, 511 (1935). See also *Automatic Canteen Co. v. Federal Trade Commission*, 346 U.S. 61, 81 (1952).

The impropriety of disposing of the petitioners' contentions that they are citizens of the People's Republic of China by a judicial construction of the term "China" is underscored in view of the administrative proceedings here. Throughout the proceedings, the term "China" consistently meant the mainland, which, of course, is governed by the People's Republic of China. Since that "China" has been determined to be a "country", *United States ex rel. Mazzei v. Shaughnessy*, 218 F. 2d 316 (2nd Cir., 1954), it could

be fairly assumed in these deportation proceedings to be the country of the petitioners' nationality rather than the Republic of China.

At no time until the hearing in the District Court below upon cross motions for summary judgment, when the administrative records were filed with the court, did the petitioners have notice that the Immigration and Naturalization Service deemed the Republic of China to be the "China" of their citizenship. The disposition which the District Court made of the petitioners' allegations, undenied by answers, that they are not citizens of the country to which the Attorney General sought to deport them precluded them from establishing in any forum the truth of their claims. It seems needless to say that this does not comport with the due process required to be afforded to aliens before they may be deported from the United States. *Japanese Immigrant Case*, 189 U.S. 100, 101 (1903).

II

The second question posed by the decision below is the nature of the evidence required to establish the nationality of deportable aliens for the purpose of determining the country of deportation. This issue is one of recurring importance in deportation proceedings because a foreign nationality is a predicate to a finding of alienage.

It has long since been settled that deportation may not be sustained without evidence to support the findings, *United States ex rel. Vajtauer v. Commissioner*, 273 U.S. 103, 106 (1927), and without findings consistent with the requirements of the statute, *Mahler* v. *Eby*, 264 U.S. 32, 43, 45 (1924). These requirements are as applicable to the determination of the country to which an alien shall be deported as they are to an administrative decision that he shall be deported. *Lewis* v. *Frick*, 233 U.S. 291, 304 (1913), citing

Lavin v. *LeFevre*, 125 Fed. 693, 696 (9 Cir., 1903), and *United States* v. *Ruiz*, 203 Fed. 441, 444 (1913); *Wenglinsky* v. *Zurbrick*, 282 U.S. 798 (1930), reversing 38 F. 2d 985 (6 Cir., 1930); *Bilokumsky* v. *Crissman*, 335 U.S. 840 (1948), reversing 164 F. 2d 412 (5 Cir., 1947), cf. dissenting opinion 164 F. 2d 414; *United States ex rel. Karamian* v. *Curran*, 16 F. 2d 958 (2nd Cir., 1927); *Saksagansky* v. *Weedin*, 53 F. 2d 13 (9 Cir., 1931); *United States ex rel. Hon Lee* v. *Sisson*, 232 Fed. 559 (2nd Cir., 1916).

As noted above, in the administrative proceedings here both the petitioners and the special inquiry officers of the Immigration and Naturalization Service, who made the determinations of nationality requisite for the ultimate directive specifying the country of deportation,[2] referred to the country of nationality as "China". Other than the petitioners' admissions that they were born on the mainland of China and that they are citizens of "China", there is little evidence in the record to establish nationality or citizenship. There is no evidence at all to establish the municipal nationality law of the Republic of China. See *Black Diamond* v. *Stewart & Sons*, 336 U.S. 386, 396 (1949); *United States ex rel. Zdanic* v. *Uhl*, 137 F. 2d 858 (2nd Cir., 1943); *United States ex rel. Jelic* v. *District Director*, 106 F. 2d 14 (2nd Cir., 1939); Cf. *Dulles* v. *Katamoto*, 256 F. 2d 545, 547 (9 Cir., 1958). It was not until the administrative determinations of nationality were made and the deportation proceedings were closed that the term "Republic of China" appears in the administrative files. Where it does appear it is in contradistinction, significantly, to the term "China" (R. 10, 132).

Indeed, the Attorney General did not contend below either in the District Court or in the Court of Appeals that his

[2] See Infra at pp. 14-15.

determinations that the petitioners are nationals of the Republic of China are based either upon evidence to that effect in the administrative proceedings or upon explicit findings. His position, set forth in the District Court in his Statement of Material Facts as to Which There is no Genuine Issue, is that he proceeded upon "the legal postulate that the Chinese Nationalist Republic is the country of which the (petitioners) are citizens" because the United States "recognizes the Chinese Nationalist Government as the only government of China * * * (and) * * * is of course the government of the Republic of China" (R. 10).

The Court below accepted the Attorney General's legal postulate for the purpose of construing his finding that the petitioners are citizens of "China" to mean that they are citizens of the "Republic of China" (R. 127-128), but it stopped short of holding that citizenship may not be held in unrecognized countries (R. 130). However, because legal postulates, needless to say, may not do service for evidence, the Court saw fit to search the "certified administrative *files*" (emphasis supplied) for "facts" to support "the Attorney General's action in treating the Nationalist Government of China on Formosa as the government and country of which the (petitioners) are natives and citizens" (R. 133).

This is not the method which the statute and the regulations fairly intend for the determination of an alien's country of citizenship.

The designations of the country to which the petitioners are to be deported were made here pursuant to 8 C.F.R. 243.1(b) (1958 ed.), which gives this authority to the District Directors.[3] No procedures for making the designations are

[3] The pertinent regulations have since been modified to vest authority in the special inquiry officer to specify the country of deportation in the "order of deportation," during the deportation proceeding upon record evidence. 8 C.F.R. 242.17(c); 242.18(c). (1962 Supp.)

specified, but 8 C.F.R. 243.1 requires that the "warrant of deportation shall be based upon the final order of deportation." That order couples a finding of the foreign nationality (as here that the petitioners are natives and citizens of China) with a finding of illegal presence in the United States. Pursuant to Section 242(b) of the Immigration and Nationality Act, 66 Stat. 209, 8 U.S.C. 1252(b) and 8 C.F.R. 242.17-18 (1958 ed.), the orders must be based upon reasonable, substantial, and probative evidence.

The Court below itself observed that it was "reviewing, in this proceeding, the orders of deportation entered by the Attorney General on the evidence adduced before the Attorney General" (R. 137). Even the most favorable review of the facts which the District of Columbia Circuit elicited from the administrative files, however, fails to justify the holding required below that the orders are based upon "reasonable, substantial, and probative evidence".

Proof of nationality in the Republic of China surely is not established by the array of facts which the District of Columbia Circuit has set forth in its opinion—whether it is the petitioners' express unwillingness to return to the mainland of China, their entry into the United States on Hong Kong Seaman's Books, their sailings on Chinese nationalist vessels, the issuance of passports by the Republic of China absent evidence that the passports were issued upon the basis of nationality, or, to cap it all, a compounded assumption that a visitor's visa issued to a Chinese alien was obtained in Hong Kong, and that such a visa indicates a severance from "adherence to Red China". Whatever these facts may indicate as to lack of citizenship in the People's Republic of China, they plainly do not measure up to reasonable, substantial or even probative evidence of nationality in the Republic of China.

The evidentiary basis for administrative findings is a

recurring problem, of course, both for the conduct of administrative proceedings and for determining the scope of judicial review. At least from *Universal Camera Co.* v. *Labor Board*, 340 U.S. 474 (1950), to *Gastelum-Quinones* v. *Kennedy*, 374 U.S. ——, (decided June 17, 1963), this Court has had occasion to determine the sufficiency of such evidence.

The issue here is of paramount importance because the determination of the proper place of deportation may have as much consequence for a deportable alien as does the finding of his deportability itself. Especially is this so, as here, where one determination rather than another may give the alien certain statutory benefits. *United States ex rel. Fong Foo* v. *Shaughnessy*, 234 F. 2d 715 (2nd Cir., 1955) (Motion for Stay, Frank J.); *Leong Leun Do* v. *Esperdy*, op. cit. concurring opinion, Lumbard, C. J., 309 F. 2d at 477-479; dissenting opinion below (R. 143-144).

III

A third question is raised by the view of the Court below that the petitioners are precluded from seeking relief in a court of equity because they do not desire to be deported to Communist China, and would resist any such action if it were ordered (R. 137-138).

This issue is of more than passing importance not merely because of the implications of the holding below but because of the recent decision of the District of Columbia Circuit in *Marcello* v. *Kennedy*, —— U.S. App. D.C. ——, 312 F. 2d 874, 877 (1962), cert. denied May 27, 1963 (No. 931).

In the latter case, as well as in the decision below, the Circuit Court relies upon the principle set forth in *Great Lakes Dredge and Dock Co.* v. *Huffman*, 319 U.S. 293, 300

(1943), that courts may withhold declaratory relief "upon established equitable principles". The standard which the District of Columbia Circuit has imposed below, however, is in plain conflict with the provisions of the Administrative Procedure Act, 5 U.S.C. 1009, 60 Stat. 243, and would defeat virtually all judicial review of the failure to comply with the statutory priorities for deportation established by Section 243(a) and (b) of the Immigration and Nationality Act, 8 U.S.C. 1253(a) and (b), 66 Stat. 212, 213. The Administrative Procedure Act provides that "any person adversely affected * * * because of any agency action * * * shall be entitled to judicial review thereof"; 5 U.S.C. 1009(a). The reviewing court is given the power to "set aside agency action * * * found to be * * * not in accordance with law * * * and unsupported by substantial evidence * * *", 5 U.S.C. 1009(e).

The lower court would read into the conditions for obtaining judicial review that aggrieved persons have good faith alternative remedies, viz., that they be willing to agree to their deportation to Communist China.

Contrary to the assumption of the District of Columbia Circuit the petitioners do not seek as their relief an order that they be deported to the People's Republic of China, nor are their contentions "tongue-in-cheek" (R. 138). Their pleadings plainly state that they complain for judgment declaring that the Attorney General may not deport them to Formosa or to Hong Kong as citizens or nationals of the Republic of China (R. 4, 95). This remedy is expressly afforded them by the Administrative Procedure Act if deportation to either Hong Kong or Formosa is not effected by the Attorney General in compliance with the statutory requirements set forth in Section 243(a) of the Immigration and Nationality Act.

A resolution of the reach of the doctrine in *Great Lakes Dredge and Dock Co. v. Huffman, supra*, as it affects the review of administrative decisions under the Administrative Procedure Act seems warranted by this Court, in view of the portentous impact which the decision below may have upon review not only of deportation proceedings, but of all other administrative agency determinations as well.

Conclusion

For the foregoing reasons, we request that certiorari be granted.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 16,996

LEE WEI FANG, ET AL., *Appellants*,

v.

ROBERT F. KENNEDY, ATTORNEY GENERAL OF THE UNITED STATES, *Appellee*.

No. 16,997

WANG SIANG-KEN, ET AL., *Appellants*,

v.

ROBERT F. KENNEDY, ATTORNEY GENERAL OF THE UNITED STATES, *Appellee*.

Appeals from the United States District Court for the District of Columbia

Decided March 25, 1963

WASHINGTON, *Circuit Judge*: These are deportation cases, involving the special problems of the Government in dealing with persons of Chinese origin. All the plaintiffs-appellants, thirty-four in number, were born on the mainland of China prior to the time that the Chinese Communists drove out the Nationalist Chinese Government recognized by the United States as the legal government of China. All appear to have left the mainland of China for Taiwan or Hong Kong some years before their entry into the United States, and none came to the United States from the Chinese mainland. All, except one who was admitted to the United States on a six months visitor's visa, were non-immigrant seamen admitted to the United States for the period their vessel was in port, not to exceed twenty-nine days. All admit that they remained in the United States beyond the time allowed them, and all concede that they are deportable. The cases were presented to us on the basis that none of them had exercised the privilege given

in the governing statute of designating the country to which he wished to be deported.[1] See Sec. 243(a) of the Immigration and Nationality Act, 66 Stat. 212, 8 U.S.C. § 1253(a) (1958).[2]

[1] Apparently this was so presented as a matter of convenience, as the fact a number of the appellants indicated preferences—though sometimes on an informal basis. None indicated a preference for Communist China. None now complains that an indicated preference was disregarded by the Attorney General. See, further, fn. 10, *infra*.

[2] Section 243(a) provides in pertinent part:

"The deportation of an alien in the United States provided for in this chapter, or any other Act or treaty, *shall be directed by the Attorney General to a country promptly designated by the alien if that country is willing to accept* him into its territory, unless the Attorney General, in his discretion, concludes that deportation to such country would be prejudicial to the interests of the United States. . . . If the government of the country designated by the alien fails finally to advise the Attorney General within three months following original inquiry whether that government will or will not accept such alien into its territory, such designation may thereafter be disregarded. *Thereupon deportation of such alien shall be directed to any country of which such alien is a subject, national, or citizen if such country is willing to accept him into its territory.* If the government of such country fails finally to advise the Attorney General or the alien within three months following the date of original inquiry, or within such other period as the Attorney General shall deem reasonable under the circumstances in a particular case, whether that government will or will not accept such alien into its territory, then such deportation shall be directed by the Attorney General within his discretion and without necessarily giving any priority or preference because of their order as herein set forth either

"(1) to the country from which such alien last entered the United States;

"(2) to the country in which is located the foreign port at which such alien embarked for the United States or for foreign contiguous territory;

"(3) to the country in which he was born;

"(4) to the country in which the place of his birth is situated at the time he is ordered deported;

"(5) to any country in which he resided prior to entering the country from which he entered the United States;

"(6) to the country which had sovereignty over the birthplace of the alien at the time of his birth; or

"(7) if deportation to any of the foregoing places or countries is impracticable, inadvisable, or impossible, then to any country which is willing to accept such alien into its territory." (Emphasis supplied.)

Following hearings in each case, the Attorney General found that the appellants were natives and citizens of China and made inquiry of the Nationalist Chinese Government as to whether it would accept them. That Government indicated it would accept only the appellants in No. 16,997, thirteen in number; these the Attorney General ordered deported to Taiwan, also known as Formosa. The remaining twenty-one, those in No. 16,996, were acceptable to the authorities in Hong Kong, and the Attorney General ordered their deported there under the alternatives in the third part of the statute.

These suits were then brought in the District Court, on the theory that each plaintiff appellant was a "subject, national and citizen" of Communist China, and that the Attorney General was obliged under the Act to ask the Government of Communist China to accept him, before asking any other government to do so. This contention had not been advanced at any earlier stage.

Both the appellants and the Government filed motions for summary judgment. Included as a part of the Government's motions were the certified administrative records of the Immigration and Naturalization Service relating to each plaintiff. The District Court, after hearing counsel, determined that there was no genuine issue as to any material fact, granted the defendant's motions, denied those of the plaintiffs, and entered judgments for the defendant as a matter of law. These appeals followed. We affirm the judgments of the District Court.

The Attorney General's findings that the appellants were natives and citizens of "China" are properly construed as findings that they were natives and citizens of the Republic of China. *Dai Hoan Shiba v. Kennedy*, 111 U.S.App.D.C. 280, 297 F.2d 791 (1961), cert. denied, 369 U.S. 844 (1962), and the Attorney General himself has so construed his own findings.[2] As we pointed out in *Bonaparte v. Chow Ba Shong*, 108 U.S.App.D.C. 115, 280 F.2d 663, cert. denied, 364 U.S. 891 (1960), the United States recognizes only the Government of the Republic of China (the Nationalist Government) as the legal Government of China—a government which has

its provisional capital on, and full control over, the island of Taiwan. In both the *Dai Ming Shih* and the *Cheng Fu Sheng* cases, we upheld the action of the Attorney General in ordering deportation of deportable citizens of "China" to the Nationalist Government on the island of Taiwan, as the country of which they were subject nationals or citizens under the second priority of the statute.[3] And see *U. S. ex rel Leong Chay Moon v. Shaughnessy*, 218 F.2d 316 (2d Cir. 1954), and *U. S. ex rel. Tom Man v. Murff*, 264 F.2d 926 (2d Cir. 1959), both of which recognize the propriety of treating Chinese citizens born on the mainland as citizens of Nationalist China, and not as citizens of Communist China, but hold that where the aliens were not acceptable to or accepted by the Nationalist Government under the second "priority" of the statute, deportation could be made only to a country willing to accept them, after inquiry, under the third part of the statute. This might, in the Attorney General's discretion, include Communist China.[4] As was said in the *Man* case, 264 F.2d at 928:

Lin v. Rogers, 164 F.Supp. 329 (D. D.C.), *aff'd per curiam*, 104 U. S. App.D.C. 374, 262 F.2d 471 (1958), is not to the contrary. There the Attorney General sought to deport a "citizen of China" born in Panama in 1925 to parents having Chinese diplomatic status) to Communist China by delivering him to the Red Chinese border without prior inquiry as to whether he would be accepted. The record indicates that the Government regarded him as pro-Communist. No issue was raised as to whether he was a citizen of Nationalist China or of Communist China. It was held that where deportation to Communist China is undertaken, the Attorney General must comply with the statute and inquire, before deportation is attempted, of the Government of Communist China whether the deportee will be accepted. *Cf.* U.S. ex rel. Tom Man v. Murff, 264 F.2d 926 (2d Cir. 1959).

[4] The *Moon* and *Man* decisions of course recognize that Communist China may be treated as a "country" in the Attorney General's discretion for purposes of part three of the statute. In both cases, the Attorney General treated Communist China as a "country," but was evidently unwilling to make any inquiry of its government as to the acceptability to it of the aliens in question. *Cf.* Lin v. Rogers, referred to in fn. 3. Further, deportation to Communist China as the country of place of birth under the third part of the statute was attempted in the *Moon* case only because the alien had previously refused to execute the documents necessary for his admission to Formosa. And this was also the situation

"Certainly if the relator is to be regarded as a 'subject national, or citizen' of Nationalist China, he may not be deported [there] because that government will not 'accept' him. We *assume that he cannot be regarded as a 'subject national, or citizen' of the Communist Government, because we do not recognize that as more than a de facto government.* There remains therefore one or more of the seven subdivisions of 243(a) of which number three certainly covers him and probably several others. . . ." (Emphasis supplied.)

See also *Wong Lune* v. *Esperdy*, 187 F.Supp. 95 (S.D. N.Y. 1960); *Chu Lavi* v. *Esperdy*, 209 F.Supp. 1 (S.D. N.Y. 1962); and *Ng Kam Fook* v. *Esperdy*, 209 F.Supp. 637 (S.D. N.Y. 1962), app. pending, all of which recognize the Nationalist Government of China on Formosa as representing the country of which persons born on the mainland of China are nationals and citizens. And see *Chao Ling Wong* v. *Pilliod*, 285 F.2d 547 (7th Cir. 1960); *Liang* v. *U. S. Department of Justice*, 290 F.2d 614 (9th Cir. 1961), in which deportation to Formosa was approved, respectively, as to a former officer of the Chinese Nationalist Navy born on the mainland, and a Chinese student who entered the United States in 1948, apparently with a Nationalist Chinese passport. Cf. *U.S. ex rel. Wong Kam Wong* v. *Esperdy*, 197 F.Supp. 914 (S.D. N.Y. 1961), and *Hom Sin* v. *Esperdy*, 209

in U. S. ex rel. Fong Foo v. Shaughnessy (decision by Judge Frank Hinc on motion to stay), 234 F.2d 715 (2d Cir. 1956), where, after he refused to execute the papers required for entry into Formosa, the alien applied under Section 243(h) of the Act for a stay of his deportation to Communist China. As we read them, these cases cannot be interpreted as holding that citizens of China, born on the mainland but having left it, must be deemed to be nationals and citizens of the Communist government. In fact all three cases proceed on the assumption that such Chinese citizens are not to be so regarded. In the absence of evidence to the further showing and that they may become deportable to Communist China only after it becomes evident that deportation to the Nationalist Government on Taiwan cannot be effected. If the contrary opinion in Leong Leun Dock v. Esperdy, 300 F.2d 467 (2d Cir. 1962) at 477-79, intends to state a different view then we respectfully must state our disagreement with it.

F.Supp. 3 (S.D. N.Y. 1962), app. pending, where the aliens designated the mainland of China as the country to which they wished to be deported.

These cases stand for the principle that nationality and citizenship, for purposes of Section 243(a) are not determined exclusively by the geographical spot where one was born, but that political matters must be considered. In the case of citizens of China, for purposes of deportation from the United States, they are properly regarded as citizens of the government of their country which the United States recognizes, at least in the absence of a showing that they in fact support and give allegiance to the government not recognized by the United States. Since effectuation of deportation to the country of which the alien is a national depends, under the statute, on securing the prior consent of that government, the statute would be deprived of effectiveness, where there are two "governments," if the Attorney General were required to secure the consent of the government not recognized by the United States. Not only are the customary diplomatic channels not available for this purpose, and the required consent virtually unobtainable, but the Attorney General would be obliged to subvert in a substantial sense the established foreign policy of the United States. And the result would be that the purpose of Congress to reduce the number of undeportables, see *Rogers v. Chow Fu Shiung*, *supra*, would also be obstructed.

The problem here is not confined to natives of China. It has arisen before. *Delany v. Moraitis*, 136 F.2d 129 (4th Cir. 1943), was the case of a deportable citizen of Greece. The territory of Greece was at the time overrun and occupied by the Nazis, and the Greek Government recognized by the United States as the legal government of Greece was in exile in England. It was held proper to deport the alien to the custody of that government in England as "the country whence they [he] came" under the statute then in effect. Speaking for the Fourth Circuit, Judge Parker said in language apt here:

"It is true, of course, that the term 'country' as used in the statute must be construed, ordinarily, to refer to the territory from which the alien came. Mensevich v. Tod, 264 U.S. 134, 136, 44 S.Ct. 282, 68 L.Ed. 591. But a man's 'country' is more than the territory in which its people live. The term is used generally to indicate the state, the organization of social life which exercises the sovereign power in behalf of the people. United States v. The Recorder, 27 Fed.Cas. page 718, 721, No. 16,129. Ordinarily the state exercises sovereignty only within the territory occupied by its people; but a different situation is presented when the territory is overrun by its enemies and its government is in exile in the territory of a friendly nation exercising power in international matters in behalf of its nationals. In such case, the government in exile has taken over the only exercise of sovereign power left to the people of the country and is the only agency representing the country with which a foreign government can deal.

"It must be remembered in this connection that the deportation of an alien is not a mere matter of taking him beyond the seas and setting him down on foreign soil. Saksagansky v. Weedin, 9 Cir., 53 F.2d 13. It must be carried out through arrangements made with the foreign government. These arrangements are matters arising in the international relationships of the nation; and these international relationships the governments in exile are thoroughly competent to deal with. They are true governments set up and organized to protect the interests of their nationals, and their powers with regard thereto are recognized and respected by the friendly nations in whose territory they function. They exercise sovereign power, moreover, not only with respect to their nationals, but also with respect to the vessels of their countries; and it has long been recognized that a vessel partakes of the character of national territory. It appears in this case

> that the government of the United States recognizes the Greek government functioning in England as the government of Greece and deals with it as such. In the matter of deporting an alien who has come to this country from Greece, the government must deal with the Greek government in England; and when, under agreement with that government, it arranges to return the alien into its power, it is not unreasonable to treat such delivery as a deportation to the 'country' whence he came in accordance with the statutory requirement."

It therefore follows that the Attorney General fully complied with the statute here, see Section 243(a), fn. 2 above, by inquiring of the Government of the Republic of China whether it would accept the thirty-four deportable natives and citizens of China and, as to the thirteen which that Government stated that it would accept, in directing deportations variously to "Taiwan," "Formosa" or "The Republic of China on Formosa." As to the twenty-one whom that Government did not accept, but whom the authorities in Hong Kong agreed to take, the Attorney General properly exercised his discretion to order them deported to Hong Kong under the third part of Section 243(a), fn. 2, *supra*, as a country willing to accept them, or as to most, if not all, of them for the reason that Hong Kong is the location of the foreign port from which they embarked for the United States, or perhaps, as to some, under others of the seven subdivisions of Section 243(a).

The Attorney General's action in treating the Nationalist Government of China on Formosa as the government and country of which the appellants are natives and citizens is fully supported by the facts appearing in the certified administrative files before us as exhibits. All thirty-four were offered the opportunity to name the place where they

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[5] Hong Kong, a British Crown Colony, is of course a "country" for deportation purposes under Section 243(a). Ying v. Kennedy, 110 U.S. App.D.C. 247, 292 F.2d 740, *cert. denied*, 368 U.S. 934 (1961); Chan v. Chan, Esperdy, 285 F.2d 353 (2d Cir. 1960).

wished to be deported, and none chose the mainland of China—or Communist China. In fact, twelve indicated affirmatively that they did not choose to go there. See footnote 10, *infra*, for the preferences expressed affirmatively. Of the thirteen accepted by the Republic of China, eight were already in possession of passports issued by the Republic of China. Of the remaining five, three entered the United States as seamen on ships flying the flag of the Nationalist Government, one possessed a Hong Kong identity card, apparently the Hong Kong Seaman's Discharge Book,[6] and the file as to the remaining one shows that he testified under oath that he did not wish to be sent to Communist China. Clearly they all had voluntarily left the mainland and the jurisdiction of Red China. The Attorney General was certainly warranted in concluding on these facts alone—although other facts could be cited in support[7]—that these thirteen individuals bore allegiance to and regarded themselves as citizens of the Republic of China, rather than of Communist China. And there is nothing in the record to suggest the contrary. The unsupported allegation of the complaints in the District Court that the deportable alien is "a subject, national, and citizen of the Peoples' Republic of China" was of course not before the Attorney General as to any of the thirty-four at the time he was required to determine the country of deportation under the statute.

As to the twenty-one refusal entry to Taiwan (in No.

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[6] The administrative file shows that Hsieh Chung San testified that he held a Hong Kong identity card, though the type of card was not further described by him. He requested that he be deported to Hong Kong if his deportation was required. However, the British Visa Office in New York City wrote that the authorities in Hong Kong were unwilling to accept to his entry into the Colony and requested the return of his Hong Kong Seaman's Discharge Book. He was finally ordered deported to Formosa as the territory of the country of which he was a national and citizen, under the statute, after that country had accepted him. There is nothing to suggest that he has ever regarded or held himself out as a citizen of Communist China.

[7] Four, in addition to the one mentioned above, testified that they did not wish to go to the Chinese mainland, and two had lived and/or had families living in Taiwan.

16,996); but accepted by Hong Kong, the facts disclosed by the administrative files support the action of the Attorney General in regarding them as nationals of the Republic of China on Taiwan.[8] Two of them on oath said that they were citizens of the Republic of China, nine others indicated to the Immigration and Naturalization Service that they adhered to the principles of the Government of Free China, and one more (in addition to two others) selected Formosa as the place he would like to go. Three others indicated, one of them in terms of fear for his life, that they did not want to be returned to the Chinese mainland. (Seven altogether, and possibly two others, in the group of twenty-one, indicated a desire not to return to the mainland.) A permissible, if not a necessary, inference as to these fifteen appellants is that they had elected to be and regarded themselves as citizens of Nationalist China, rather than Red China. As already indicated, they, and all the others, had escaped from or left the mainland of China.

Of the remaining six—those who did not affirmatively indicate adherence to Nationalist China and who did not affirmatively state that they did not wish to be returned to the mainland—four held Hong Kong Seaman's Identity Books, documents issued in lieu of a national passport, which permitted the holder to return to Hong Kong without a visa, either as a seaman or as a deportee from the United States; and one more held the Hong Kong Seaman's Discharge Book (but apparently not the Identity Book), a document which recorded data as to the voyages made by the holder and upon which the British Visa Offices in this country were empowered to grant, without further inquiry, an entry visa to the holder valid for his return to Hong Kong. In the absence of anything else, the conclusion

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[8] It should be noted that the Attorney General was not advised by the Chinese Consul in this country that any one of the twenty-one was denied entry to Taiwan for the reason that he was not a national or citizen of the Republic of China. When a reason was given, it was that the subject "does not possess the required entry permit for Taiwan pursuant to regulations." Quite possibly the fact that none appears to have "escaped" or gone to Taiwan and that eighteen (see footnote 9, *infra*) held seamen's documents issued by Hong Kong, with the right of entry there, may have been considered.

is inescapable that those with Hong Kong papers[2] had escaped to or gone to Hong Kong, that they do not regard themselves as citizens of Red China, and that they do not desire to be deported there.

The remaining deportee of the twenty-one was not a seaman but came to the United States on a six months visitor's visa, which he overstayed. Although the file before us does not indicate where the visitor's visa was granted, the Attorney General could fairly assume—if he did not possess positive information that it was obtained in Hong Kong (since Taiwan did not accept him) and therefore that he had severed himself from adherence to Red China. In any case, since a visitor's visa for the United States is something that could not be obtained in Communist China, a government with which we have no diplomatic relations, an assumption would certainly not be warranted that the holder was a citizen of Communist China or that he wished to be returned there.

There is no basis for any claim that appellants were not accorded due process of law. Each appellant was given an administrative hearing, with the opportunity to present evidence, before his deportation was ordered to Nationalist China or to Hong Kong. At the hearings thirty of the thirty-four were represented by counsel. The remaining four were advised that they were entitled to be represented by counsel but indicated that the hearing should proceed without counsel. All were offered the opportunity at the hearing of naming the place or country to which they wished to be deported and, as previously indicated, none specified Communist China or the mainland of China. As shown above, the evidence before the Attorney General warranted, if it did not compel, the conclusion that the thirty-four were, and regarded themselves as, subject nationals and citizens of the Republic of China on Formosa, rather

[2] Of the twenty-one, a total of eleven were shown to have held the Hong Kong Seaman's Identity Book, and a total of seven who did not hold the Identity Book, were shown to have held the Hong Kong Seaman's Discharge Book. Thus, eighteen of the twenty-one were shown to have received Hong Kong Seaman's documents giving them Hong Kong entry rights and a status which can be described as that of a resident.

than of Red China. The order of deportation in each case is in accord with the statute, with our prior decisions and with the record facts.

As we have indicated earlier in this opinion, Communist China has, in a few instances and under special circumstances, been treated as a "country" for deportation purposes, and we do not hold that it may not be a "country" for such purposes. But the Attorney General here was required to determine the country of nationality and citizenship, for deportation purposes, on the record made respecting each alien before him. The District Court has reviewed and we now are reviewing, in this proceeding, the orders of deportation entered by the Attorney General on the evidence adduced before the Attorney General. As already abundantly indicated, nothing before him even suggested that any of the thirty-four were in fact subject nationals or citizens of Communist China or that any wished to claim such citizenship. The Attorney General, on this record, was fully justified in treating the appellants as subject nationals or citizens of the Republic of China. And the District Court could not have reached any other conclusion. The bare allegation by the appellants in their complaints that they are citizens of Communist China[8] totally unsupported by the record facts, indeed if is negated by the record.

It is amply plain from the record and from counsel's statements in oral argument that plaintiffs-appellants do not desire to be deported to Communist China, and would resist any such action if it were ordered.[9] They, thus are

[8] As indicated, none of the thirty-four plaintiffs said that he wished to be deported to the mainland of China or to Red China, and twelve stated affirmatively at their hearings that they did not wish to go there. Of the twenty-one ordered deported to Hong Kong, thirteen indicated affirmatively (although perhaps not formally) a desire to be deported to places other than Red China; *e.g.*, eight to Hong Kong, three to Formosa (entry refused), one to Sweden (entry refused) and one to Singapore (entry refused); and one more indicated affirmatively that he did not wish to go to the Chinese mainland. As to the remaining seven in this category, six held a Hong Kong Seaman's Identity Book or a Hong Kong Seaman's Discharge Book (in one case both books), four of these six had indicated an adherence to the principles of the Government of Free

in no position to ask relief from a court of equity. Cf. *Chan Chin Chiew* v. *Marsh*, 168 F.Supp. 349 (S.D. N.Y. 1958). The extraordinary remedies of equity are available to those who have a real grievance—not to those who are asking relief for purposes of delay, and relief which if granted they would promptly repudiate.[1] We adopt the statement made in similar circumstances in *Na Kim Fook* v. *Esperdy*, 209 F.Supp. at 638, that:

> "Plaintiff cannot subvert the purpose of section 243(a) with this 'tongue-in-cheek' contention."

The judgments of the District Court will accordingly be

Affirmed.

China, the fifth had a wife and the sixth had a wife and four children living in Hong Kong—clear indications that they had no allegiance to Red China. The seventh one is the non-seaman discussed above in the text.

Of the thirteen ordered deported to Taiwan, one indicated affirmatively that he wished to be deported to Taiwan, four indicated that they wished to be deported to Hong Kong (one returned), and two more stated affirmatively that they did not wish to be sent to the Chinese mainland. As to the remaining six, their connections were with Taiwan, all held passports issued by the Nationalist Government, and one had gone to Taiwan in 1947, and had his family (wife, four children, and father) there.

[1] Ostensibly, of course, appellants are asking only for a stay of deportation. But in fact they are asking that the Attorney General be compelled, if he wishes to continue to seek their deportation, to attempt to provide their acceptance by Communist China, something appellants emphatically do not desire. We may note that although deportation does not appear to have been directed at the time, one of the appellants, Lo Yin Ho, in No. 16,806, applied for relief under Section 241(b) (3) from deportation to mainland China and secured it in 1960 by a threatening of such deportation for an indefinite period, subject to revocation upon thirty days' notice

WILBUR, *Circuit Judge, dissenting:* As the court's opinion indicates, appellants are 34 Chinese admittedly in this country illegally. Thirteen have been ordered deported to Nationalist China (Formosa) and 24 to Hong Kong. They are here resisting deportation to these countries on the ground that they are not subject nationals or citizens thereof and that the proceedings which resulted in these deportation orders are lacking in due process.

Section 243(a) of the Immigration and Nationality Act of 1952 outlines the priorities as to countries to which aliens illegally in this country shall be deported. Under this section the alien is to be deported to the country designated by him, unless the Attorney General concludes that deportation to such country would be prejudicial to the interests of the United States or unless that country refuses to accept the alien. If this first priority is not satisfied, then the alien is to be deported "to any country of which such alien is a subject, national, or citizen if such country is willing to receive him into its territory." If the second priority cannot be satisfied, Section 243(a) provides seven alternative countries culminating in "any country which is willing to accept such alien," any one of which may be chosen by the Attorney General.

The aliens here did not exercise their right under the first priority to designate a country. After their deportation hearing, at which they admitted that they were natives of "China" and citizens of "China" and were so found to be, in those terms, by the Special Inquiry Officer of the Immigration Service, the Attorney General made inquiry of the Nationalist Chinese Government as to its willingness to accept appellants. The Attorney General's action was predicated on the assumption that there is only one "China" and the United States does not recognize Communist China. When Nationalist China agreed to take only 13 of the appellants, the Attorney General ordered all appellants from Hong Kong to deport the balance there.

[illegible] appellants are entitled to due process of law in the deportation proceedings, [illegible] a hearing with

findings supported by evidence in the record." This requirement applies to the determination of the country to which an alien shall be deported under Section 243 of the Act. There is little evidence in these records beyond appellants' admissions that they were born on the mainland of China and that they are citizens of "China." Those admissions are the basis for the Special Inquiry Officer's finding that

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[2] For a collection of the cases, see Annotation, 91 L.Ed. 329, supplemented, 96 L.Ed. 376.

[3] *Bellas Hess v. Cressman*, 335 U.S. 840 (1948), reversing 5 Cir., 164 F.2d 412 (1947); *Lewis v. Frick*, 233 U.S. 291, 301 (1914). See concurring opinion of Judge Lumbard in *Hong Leiu Do v. Esperdy*, 2 Cir., 300 F.2d 107, 117 (1962).

[4] I cannot agree that the record in each of these cases will support a finding that the deportee is a "subject national, or citizen" of Nationalist China. The majority relies heavily upon the fact that many of these deportees express dislike for, and fear persecution by, the Communist government. To me, this is not an acknowledgement of allegiance to the Nationalist government. I summarize briefly the other evidence in the individual cases.

The group accepted by Formosa: Chung Kung Mun, Ho Lone Lee Shu Fong Koo, Chen Chin Yuen and Liu Tse An apparently had Nationalist Chinese passports. The passports are not in the record so we do not know if these passports are based on citizenship. Wong Suang Ken and Lee Ok Wah have families on the mainland, but sailed aboard Nationalist flag vessels. Sung Ming Fa has a family on the mainland, but had worked in Formosa, had a Nationalist Chinese passport, and had worked on Nationalist flag vessels. Kwok Hon Chu referred to the mainland as "the country of my birth, nationality and last residence," but had been employed on a Nationalist flag vessel. Hsin Pao Tang has a family on the mainland, he may have had a Nationalist Chinese passport, and was employed on a Nationalist flag vessel. Ma Tak Lee worked in Formosa, had been there and had a Nationalist Chinese passport. Hsieh Chung Shan had a Hong Kong seaman's identity card and seaman's discharge books. There is no evidence as to Foo Mow Shu. Only two of these deportees had ever been in Formosa.

The group rejected by the Nationalist government and accepted by Hong Kong: There is no evidence connecting Lee Chung Wong, Yu Yuk Ok, Fok Pun, Chung Kee Wan, Leung Gar Kuk, Wong Kee, Lee Ah Ho or Ho Sung Chai with Nationalist China. Ng Ho Wai, Lee Kwok Sun, Chung Yu Cho, Yu Sang Chan, Shek Fook Yuen, Sou Lee Yip, Ho Kau, Kwok Chung Wah, and Ip Chi Kwong had no connection with the Nationalist government but were born and apparently lived on the mainland. Yu Sai Tung testified that he was a native of China. Chung Sai Piao, who had a family on the mainland,

they are natives and citizens of "China." But there is no proof as to the "China" the appellants or the Special Inquiry Officer had in mind. Moreover, there is in the record no evidence whatever as to the municipal law of Nationalist China.[2] Consequently, we are uninformed as to whether, under the law of that country, these aliens, in particular, are subject nationals or citizens thereof, or whether, in general, Nationalist China claims as subject nationals or citizens all persons born on the mainland. Under these circumstances, it appears to me that the conclusion that these appellants are subject nationals or citizens of Nationalist China is not only without support in the record, but is likewise without support in the findings themselves.

Appellee seems to admit all this. He argues, however, that since this country does not recognize Communist China, legally there is only one China, and therefore Nationalist China must have been in the minds of the appellants when they made their admissions and in the mind of the Special Inquiry Officer when he made his findings. This "legal postulate," as appellee describes it, apparently is being advanced for the first time. Time and again, the Depart-

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stated, "I am a citizen of the Republic of China, being born in Kwangtung Province." This suggests that he equated citizenship with nativity. Choy Fat also stated, "I am a citizen of the Republic of China," without further explanation. None of this group has ever been on Formosa.

The majority cites the fact that several of the deportees had Hong Kong identity cards or seaman's discharge books. The nature of the discharge book does not appear in the record, but the Hong Kong identity card carries the printed statement: "This card issued without prejudice to and in no way affects the national status of the holder."

[2] *See Black Diamond v. Stewart*, 312 U.S. 256, 260 (1940); *United States ex rel. Zdunic v. Uhl*, 2 Cir., 137 F.2d 868 (1943); *United States ex rel. Acly v. District Director of Immigration*, 2 Cir., 106 F.2d 14 (1939). Compare *Dallas v. Katamoto*, 9 Cir., 256 F.2d 345, 347 (1958). The omission is significant. As described *supra*, Note 1, and in Note 8 of the court's opinion, the Nationalist Chinese government apparently applied its own municipal law in accepting some and rejecting others of these aliens. It accepted only those deportees who had lived on Formosa, who held Nationalist Chinese passports, or who worked on Nationalist Chinese vessels. Thus it appears that Nationalist China itself does not consider the Hong Kong group as its "subject nationals," or citizens.

ment of Justice has attempted to deport aliens born on the mainland to Communist China." The fact that some such aliens have frustrated the attempt by invoking Section 243(h)[7] of the Act and alleging they will be subjected to physical persecution if sent to Communist China[8] cannot now justify the invocation of a "legal postulate." Most of the appellants here have indeed indicated that if they are returned to the mainland of China, they too will be persecuted. And counsel for appellants, in argument, has frankly stated that he will invoke Section 243(h) on behalf of some, if not all, of the appellants if he is successful in showing that the "China" to which they referred in their admissions was the China on the mainland; and that, consequently, under the second priority of Section 243(a) they must be deported, if at all, to Communist China.

It is clear, therefore, that the real issue around which this case centers is whether these appellants, or most of them, have a right to invoke Section 243(h). If appellee is successful in his suggestion that "China" means Nationalist China, then, of course, these appellants will be deported to the countries indicated above, since they would not be in a position to invoke Section 243(h) as to those countries. On the other hand, if it were held that these appellants are subject nationals or citizens of Communist China,[9] Section 243(h) would become available to them.

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[8] *See, e.g., United States ex rel. Tom Man v. Murff*, 2[illegible] F.2d [illegible] (1956), 56 Geo. Wash. L. Rev. 700 (1988); *Kwong Hai Chew v. Colding*, 344 U.S. 590 (1953); *United States ex rel. Tom Kwan v. Shaughnessy*, 2 Cir., 234 F.2d 715 (1955); *United States ex rel. Leong Choy Moon v. Shaughnessy*, 2 Cir., 218 F.2d 310 (1954).

[7] 66 Stat. 212, 8 U.S.C. § 1253(h), which reads: "The Attorney General is authorized to withhold deportation of any alien within the United States to any country in which in his opinion the alien would be subject to physical persecution and for such period of time as he deems to be necessary for such reason." See Note, 62 Yale L.J. [illegible] (1953).

[8] *See, e.g., United States ex rel. Tom Man v. Murff*, *supra*, Note [illegible]; *United States ex rel. Kwong Hai Chew v. Shaughnessy*, *supra*, Note [illegible]; *United States ex rel. Leong Choy Moon v. Shaughnessy*, *supra*, Note [illegible].

[9] The lawyers hold that one cannot have Communist nationality or citizenship of Communist China because this country does not recognize that government, relying on *United States ex rel. Tom Man v. Murff*, [illegible] Note [illegible].

Congress, in passing Section 243(a) of the Act, obviously intended to simplify the problem of deporting aliens, but it did not give the Executive an unrestricted hand. Under Section 243(a), since appellants indicated no preference under the first priority, in order to deport them it became necessary to determine their citizenship or nationality under the second. This has not been done, at least not in accordance with applicable standards of due process. The fact that these Chinese may be able to make a valid application under Section 243(h) to withhold deportation because of physical persecution cannot justify short-circuiting the second priority under Section 243(a). Nor, in my judgment, can their effort to assert whatever rights they may have under the Immigration and Nationality Act of 1952 preclude consideration of their application to a court of equity for enforcement of due process of law.

Filed March 25, 1963 Nathan J. Paulson, Clerk

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1962

Civil 30-62
Civil 1586-61

No. 16,996

LEE WEI FANG, ET AL., *Appellants*,

v.

ROBERT F. KENNEDY, ATTORNEY GENERAL OF THE UNITED STATES, *Appellee*

No. 16,997

WANG SHANG KEN, ET AL., *Appellants*,

v.

ROBERT F. KENNEDY, ATTORNEY GENERAL OF THE UNITED STATES, *Appellee*

Appeals from the United States District Court for the District of Columbia.

Before: WASHINGTON, BASTIAN and WRIGHT, *Circuit Judges*.

JUDGMENT

These causes came on to be heard on the records on appeals from the United States District Court for the District of Columbia, and were argued by counsel.

UPON CONSIDERATION WHEREOF, it is ordered and adjudged by this Court that the judgments of the District Court appealed from in these cases are affirmed.

PER CURIAM.

Dated: March 25, 1963.

Separate dissenting opinion by Circuit Judge Wright.

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 30-62

LEE WEI FANG, ALSO KNOWN AS LEE CHEONG SOON, 54 East Elizabeth Street, Apt. 35, New York, New York, *Plaintiff*,

vs.

ROBERT F. KENNEDY, ATTORNEY GENERAL OF THE UNITED STATES, *Defendant*

[Filed March 16, 1962]

JUDGMENT

These causes having come before the Court on cross-motions for summary judgment; counsel having been heard; the Court having considered the administrative records and being fully advised in the premises; and the Court having determined there is no genuine issue as to any material fact and that defendant is entitled to judgment as a matter of law.

It is this 15 day of March, 1962

ORDERED, ADJUDGED AND DECREED:

(1) That defendant's motions for summary judgment be, and the same hereby are, granted; and

(2) That plaintiffs' motions for summary judgment be, and the same hereby are, denied, and their actions are dismissed.

EDWARD M. CURRAN,
United States District Judge

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 1586-61

WANG SIANG-KEN, ET ALS., *Plaintiffs*

vs.

ROBERT F. KENNEDY, ATTORNEY GENERAL OF THE UNITED STATES, *Defendant*.

[Filed March 16, 1962]

JUDGMENT

These causes having come before the Court on cross-motions for summary judgment; counsel having been heard; the Court having considered the administrative records and being fully advised in the premises; and the Court having determined there is no genuine issue as to any material fact and that defendant is entitled to judgment as a matter of law.

It is this 15 day of March, 1962

ORDERED, ADJUDGED AND DECREED:

(1) That defendant's motions for summary judgment be, and the same hereby are, granted; and,

(2) That plaintiffs' motions for summary judgment be, and the same hereby are, denied, and their actions are dismissed.

EDWARD M. CURRAN,
United States District Judge.

17361-61.

BRIEF FOR THE RESPONDENT IN OPPOSITION

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No. 288

In the Supreme Court of the United States

October Term, 1968

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In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 230

LEE WEI FANG, WANG SIANG-KEN, ET AL., PETITIONERS

v.

ROBERT F. KENNEDY, ATTORNEY GENERAL OF THE UNITED STATES

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (Pet. App. 19-31) is reported at 317 F. 2d 180.

JURISDICTION

The judgment of the Court of Appeals was entered on March 25, 1963. The petition for a writ of certiorari was filed June 24, 1963. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether respondent has complied with the statutory mandate to inquire whether an alien deportee will be received by the country of which he is a "sub-

ject national, or citizen" by addressing such inquiry to the Nationalist Chinese Government on Formosa—the only government recognized by the United States as having *de jure* dominion over China—when the petitioners have conceded, and the administrative authorities have found, that the petitioners are natives and citizens of China.

STATUTE INVOLVED

Section 243(a) of the Immigration and Nationality Act, 8 U.S.C. 1253(a), provides:

> The deportation of an alien in the United States provided for in this Act, or any other Act or treaty, shall be directed by the Attorney General *to a country promptly designated by the alien if that country is willing to accept him into its territory*, unless the Attorney General, in his discretion, concludes that deportation to such country would be prejudicial to the interests of the United States. No alien shall be permitted to make more than one such designation, nor shall any alien designate, as the place to which he wishes to be deported, any foreign territory contiguous to the United States or any island adjacent thereto or adjacent to the United States unless such alien is a native, citizen, subject, or national of, or had a residence in such designated foreign contiguous territory or adjacent island. If the government of the country designated by the alien fails finally to advise the Attorney General within three months following original inquiry whether that government will or will not accept such alien into its territory, such designation may thereafter be disregarded. Thereupon de-

portation of such alien shall be directed *to any country of which such alien is a subject national, or citizen if such country is willing to accept him into its territory.* If the government of such country fails finally to advise the Attorney General or the alien within three months following the date of original inquiry, or within such other period as the Attorney General shall deem reasonable under the circumstances in a particular case, whether that government will or will not accept such alien into its territory, then such deportation shall be directed by the Attorney General within his discretion and without necessarily giving any priority or preference because of their order as herein set forth either—

(1) to the country from which such alien last entered the United States;

(2) to the country in which is located the foreign port at which such alien embarked for the United States or for foreign contiguous territory;

(3) to the country in which he was born;

(4) to the country in which the place of his birth is situated at the time he is ordered deported;

(5) to any country in which he resided prior to entering the country from which he entered the United States;

(6) to the country which had sovereignty over the birthplace of the alien at the time of his birth; or

(7) if deportation to any of the foregoing places or countries is impracticable, inadvisable, or impossible, then to any country which is willing to accept such

alien, into its territory. [Emphasis added.]

STATEMENT

This petition by thirty-four aliens challenges the propriety of the orders for their deportation. Although there are factual differences, the identity of the ultimate legal issue led to the consolidation of these cases in the courts below. J.A. 1, 93.[1] Each of the petitioners is admittedly deportable, having remained in this country unlawfully following a temporary admission. In all but one instance, the aliens were admitted as crewmen and overstayed their shore leave. Pet. A. 19. All appear to have left the Chinese mainland for Formosa or Hong Kong some years before coming to the United States, and none came to this country from the Chinese mainland. *Id.*

Each of the petitioners was given a hearing at which he conceded deportability and was found deportable. *E.g.*, J.A. 12, 13, 18. In each instance, the petitioner admitted that he was a native and citizen of China (*e.g.*, J.A. 16, 38, 43, 46, 50, 52, 72, 76, 81, 87, 102, 114, 117, 119), and a finding to this effect was made by the special inquiry officer who conducted the hearing (*e.g.*, J.A. 18).

At his hearing, each petitioner was given an opportunity, as required by Section 243(a), *supra*, to designate the country for his deportation. Naming one of

[1] References to the Joint Appendix in the court below are designated J.A. Additional facts appear in the certified administrative files lodged with the court below. These are summarized in the opinion of the Court of Appeals, set forth at an Appendix to the petition for a writ of certiorari; such summaries are designated Pet. A.

exercised this privilege." Pet. A. 19-20. None of petitioners described himself in the administrative proceedings as a citizen of the Peoples' Republic of China ("Red China") or indicated that he wished to go there. Indeed, a number of the petitioners specifically disclaimed a wish to go to Red China (*e.g.*, J.A. 17, 20, 28, 29, 49, 57, 60, 71, 85, 107, 115, 117, and 123), and several stated that they feared persecution or death if sent there (J.A. 45, 65, 66, 69, 110).

After the deportation orders were entered, respondent proceeded, in accordance with the procedure then in effect, to fix the country to which the alien would be deported. Since no effectual designation of a country of deportation had been made by petitioners, the next step, under the statute, was to inquire whether the country of which the deportee was a "subject, national, or citizen" would accept him. This was done by addressing a communication in each instance to the Republic of China ("Nationalist China"), asking whether it would accept the deportee. *E.g.*, J.A. 19, 32.[1] Nationalist China agreed to accept thirteen of the

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[1] As indicated in the opinion below, this was a concession made by the parties for the sake of convenience and in order to avoid obscuring the issue. Actually, some of the petitioners had indicated preferences, but apparently in no such detail, and did the country of choice agree to receive the deportee.

Under the procedure in effect at the time of these deportation orders, the fixing of the place of deportation took place after the order of deportation was entered. The deportation order merely specified that the alien was to be deported "pursuant to law." Since January 22, 1962, the place of deportation is determined during the deportation hearing and is fixed in the order of deportation. See Gordon and Rosenfield, *Immigration Law and Procedure* (1962 revision) 255.3-255.4

petitioners. J.A. 10, 99.* They were thereupon notified that they were to be deported to Formosa (Taiwan). *E.g.*, J.A. 99. When Nationalist China declined to receive the other twenty-one petitioners; an inquiry was addressed to Hong Kong, which agreed to receive them, apparently because they previously had resided there. Pet. A. 21, 30. These petitioners thereupon were notified that they would be deported to Hong Kong. *E.g.*, J.A. 20.

Petitioners then initiated proceedings for declaratory and injunctive relief, contending for the first time that respondent had improperly regarded them as citizens of Nationalist China; that they were subjects, nationals, and citizens of Red China; and that their expulsion could not proceed unless respondent first addressed an inquiry to Red China, asking whether it would receive them. J.A. 2, 94, Pet. A. 21. In the court below, petitioners indicated that they did not actually desire to be deported to Red China and would resist such action if it were ordered. Pet. A. 30. Their contention, however, was that the statute entitled them to procedural rights which respondent had not accorded.

Both sides moved for summary judgment, and respondent presented the certified administrative files in connection with his motion. J.A. 4–9, 96–100. The district court granted respondent's motion and dismissed the complaints. J.A. 123. Its judgment was

*There are indications in the administrative records that at least some of these either had resided in Formosa, had families residing there, or had obtained passports from the Nationalist government. Pet. A. 31.

affirmed on appeal, Circuit Judge Wright dissenting. Pet. A. 19–36.

ARGUMENT

1. In Section 243(a) of the Immigration and Nationality Act, Congress prescribed a comprehensive formula for executing orders of deportation. The aim of this legislation, clearly stated in the legislative reports, was to enlarge the Attorney General's discretion in finding a destination for deportees and to eliminate some of the obscurities in the prior law which had resulted in the establishment of a large group of "undeportable" aliens. See *Rogers* v. *Cheng Fu Sheng*, 280 F. 2d 663 (C.A.D.C.), certiorari denied, 364 U.S. 891; *Chan Chack* v. *Esperdy*, 285 F. 2d 353 (C.A. 2). We submit that this purpose would be seriously impaired by the acceptance of petitioners' contentions.

The issues here are clearly discerned only if the statutory scheme is viewed in its entirety. The statute fashions three steps for the selection of a deportee's destination, and each depends on its predecessor: Step 1 allows the deportee to designate the place of his deportation. If deportation is not accomplished under Step 1, then the Attorney General must proceed to Step 2—inquiry whether the country of the deportee's nationality will accept him. If that too is unsuccessful, then the Attorney General is given a wide range of alternatives, listed in seven categories, culminating in authorization to deport the alien to any country that will receive him.

Here the first step has been taken, since petitioners have declined to designate a country of prefer-

ence. It is manifest also that petitioners could be deported to Formosa or Hong Kong under one or more of the alternatives listed in Step 3.[5] The key to the controversy is that Step 3 cannot be taken until Step 2 has been passed. Although petitioners have no desire to go to Red China, they evidently believe that they can stave off or delay their expulsion if the Attorney General is required to direct an inquiry to an unrecognized government with which the United States has no diplomatic intercourse.

Section 243(a) refers frequently to the country of deportation, but nowhere does it define "country". In *Burnet v. Chicago Portrait Co.*, 285 U.S. 1, 5, this court recognized that "country" is an ambiguous term, which "may be taken to mean foreign territory or a foreign government". Whether the statute uses the term in a geographical or a political sense must be determined by an assessment of the legislative purpose, recognizing that Congress has sometimes used the same term in different senses in the same statute. See *Ying v. Kennedy*, 292 F. 2d 740 (C.A.D.C.), certiorari denied, 368 U.S. 914. Section 243(a) obvi-

[5] Although no channel for directing such inquiries was open at the time this litigation commenced, a formula of communication with Red China regarding the acceptability of deportees has been devised, within the past few months, through the ambassadorial talks with representatives of Red China in Geneva and Poland which have been taking place for some time. While this expedient has been used in a few cases where aliens have designated Red China under Step 1 it is still too early to tell whether it will be effective or how long it will continue. In any event, its use does *not* settle the larger political question of fixing the country of nationality, under Step 2, for Chinese as well as other aliens.

ously uses "country", at least to some extent, in a geographical sense. This usage has been recognized in facing several of the alternatives under Step 3, which itself refers to "places or countries". See *Rogers* v. *Cheng Fu Sheng*, 280 F. 2d 663 (C.A.D.C.), certiorari denied, 364 U.S. 891 (Formosa); *United States ex rel. Leong Chay Moon* v. *Shaughnessy*, 218 F. 2d 316 (C.A. 2) (Red China); *Chan Chuen* v. *Esperdy*, 285 F. 2d 353 (C.A. 2) (Hong Kong). But it is equally plain, in our view, that the reference in Step 2 to the country of nationality or citizenship has a political, and not a geographical, connotation.

This is so because nationality is unmistakably a political concept. A national is defined as a person owing permanent allegiance to a State. Section 101 (a)(21), Immigration and Nationality Act, 8 U.S.C. 1101(a)(21). Nationality status depends on a State's domestic law. 2 Hyde, *Int. Law* (2d Rev. ed.) 1064–1068; 3 Hackworth, *Digest of Int. Law* 1–3. These precepts necessarily contemplate a State whose existence and legal authority are recognized by the political agencies of our government. Geography is relevant here only in locating the place from which the person's allegiance stems. The government to which that allegiance attaches—the country of which he is a national or citizen—is determined by political considerations.

Such a political determination can be, and is, made only by the political agencies of our government. And when a determination of this character is made, it is binding on all agencies, including the judiciary. As this Court has often stated, the determination of the government to be recognized as exercising sovereignty

over a particular area is a political, and not a judicial, question. *Jones v. United States*, 137 U.S. 202, 214; *Guaranty Trust Co. v. United States*, 304 U.S. 126, 137-138.

These considerations appear decisive in ascertaining the allegiance of citizens of China. Although the Communist regime is in *de facto* control of the mainland, the United States does not recognize Red China; it does recognize Nationalist China as the only government exercising *de jure* sovereignty over China. Since this political determination is conclusive, it follows that an inquiry as to acceptability addressed to Nationalist China, as the country of petitioners' nationality, satisfies the requirements of Step 2 under Section 243(a).

Any other result might involve our government in embarrassments and difficulties in its foreign relations, for the obvious reason that it would require the Attorney General to communicate with a regime whose authority is not recognized by the United States. Certainly, the statute should not be construed to create obstacles which would impair its basic purpose, *i.e.*, to facilitate the selection of a place for deportation. It should be noted that the difficulties invited by petitioners' contentions would apply equally in any situation, now or in the future, where our government does not recognize the seizure of foreign territory. A similar problem was faced during World War II. Thus, in *Delany v. Moraitis*, 136 F. 2d 129, 130 (C.A. 4), the court of appeals observed:

> Ordinarily the state exercises sovereignty only within the territory occupied by its people; but

a different situation is presented when the territory is overrun by its enemies and its government is in exile in the territory of a friendly nation exercising power in international matters in behalf of its nationals. In such case, the government in exile has taken over the only exercise of sovereign power left to the people of the country and is the only agency representing the country with which a foreign government can deal.

Petitioners are mistaken in suggesting (Pet. A. 10-12) that respondent's reading of the term "country" has been inconsistent. Respondent, it is true, has deemed Red China a "country" within the geographical description contemplated by at least some of the alternatives in Step 3 of Section 243(a). That interpretation has been accepted by the courts. See *United States ex rel. Leong Choy Moon* v. *Shaughnessy*, 218 F. 2d 316 (C.A. 2); *Tom Man* v. *Murff*, 264 F. 2d 926 (C.A. 2). But we are unaware of any instance in which respondent has regarded Red China as the *country of nationality* for Chinese aliens under Step 2. And respondent's orders requiring deportation to Nationalist China as the country of nationality have been endorsed by the courts without exception. See *Dai Ming Shih et al.* v. *Kennedy*, 297 F. 2d 791 (C.A.D.C.), certiorari denied, 369 U.S. 844; *Liang* v. *United States Dept. of Justice*, 290 F. 2d 614 (C.A. 9); *Chao-Ling Wang* v. *Pilliod*, 285 F. 2d 517 (C.A. 7); *Rogers* v. *Cheng Fu Sheng*, *supra*; *Leong Leun Do* v. *Esperdy*, 309 F. 2d 467 (C.A. 2). See, also, *Tom Man* v. *Murff* and *United States ex rel. Leong Choy Moon* v. *Shaughnessy*, *supra*. Those who have

asserted, like petitioners, that Red China is the country of their nationality have had their claims rejected. *Dai Ming Shih* v. *Kennedy, supra*; *Chu Lam* v. *Esperdy*, 209 F. Supp. 1 (S.D. N.Y.). Since the instant petition was filed, the Second Circuit has handed down its decision in *Ng Kam Fook* v. *Esperdy* (C.A. 2), decided July 2, 1963, reproduced in the Appendix, agreeing with the holding below. Thus, petitioners' assertion that they are nationals of Red China is unsupported by any judicial or administrative decision.

2. Petitioners were not denied any procedural benefits to which they were entitled. They were accorded a full hearing, at which they admitted that they were nationals and citizens of China and conceded their deportability. They declined to designate a country of deportation. The Attorney General then proceeded to Step 2 of the statutory plan, under which he inquired whether the country of their nationality would receive them.

Petitioners evidently believe they have a right to a further hearing to determine whether they are nationals of Red China. Such an additional hearing has never been required by statute, regulation or decision. Moreover, we cannot see what would be accomplished by such a hearing, other than delay. The facts have already been established in the administrative hearings, at which the special inquiry officers found, on the basis of explicit admissions, that the petitioners are natives and citizens of China. The legal conclusion to be drawn from those facts is a matter for determination by the administrative authorities, subject to review

in the courts. And in this instance, as we have shown, this determination is political in nature and can properly be made only by the political agencies of our government.

As noted above, petitioners' preferences, as between Red and Nationalist China, are relevant only under the first step. The succeeding process is designed to locate a country to which compulsory expulsion, with the assent of the receiving country, can be required. In the administrative proceedings none of the petitioners claimed he was a citizen of Red China. Each of them was given an opportunity, as required by law, to designate the country of his deportation; none selected Red China. Each had left Red China years earlier. As we have noted, many of them specifically expressed opposition to Red China as a place for deportation and some stated that they feared persecution or death if they were sent there.

The contention of petitioners that the fixing of their place of deportation must rest on "reasonable, substantial, and probative" evidence misreads the statute, which prescribes this requirement only for the "decision of deportability". Section 242(b)(4), Immigration and Nationality Act, 8 U.S.C. 1252(b)(4). No such requirement for the fixing of the place of deportation is imposed by statute or regulation. The cases which they cite (Pet. 12-13) hold only that the determination of the place of deportation is subject to judicial review for the limited purpose of examining a charge that it was arrived at arbitrarily or illegally. Nowhere do they suggest that a separate hearing must be conducted to fix the place of deportation. In any

event, the determination here has a wholly adequate factual and legal basis.

The dissenting opinion below reasons that the determination that Nationalist China is the country of nationality deprived petitioners of a "right" to claim that they would be persecuted in Red China. This view, we believe, rests upon a misinterpretation of the statute. Section 243(h) of the Immigration and Nationality Act, 8 U.S.C. 1253(h) does not give to a deportee an abstract right to solicit a stay of deportation. Under that provision, the Attorney General is authorized to withhold deportation to any country in which he determines the deportee would be physically persecuted. The remedy comes into play only in relation to a country to which the Attorney General proposes to effect deportation. Since the Attorney General has not proposed to compel deportation to Red China, there is no occasion for him to consider whether petitioners would be subjected to physical persecution in that country.

3. Petitioners take issue with the observation of the court below that their contentions are presented "tongue-in-cheek", and that, since they have no genuine desire for the relief they seek, their plea does not warrant equitable relief. Since the decision below has independent basis, this scarcely presents an issue for review. In addition, we believe that the court's statement was entirely warranted. Petitioners would "jam" the machinery for the expulsion of an admittedly deportable alien by requiring the Attorney General to communicate with a government not recognized by the United States in order to ask whether it

would accept petitioners, albeit they have never evinced any interest in going to that country, have failed to designate it as their country of choice for deportation (although given full opportunity to do so) and have stated, forsooth, that they would resist their deportation there. Petitioners, in short, are urging that respondent exhaust Step 2 by addressing his inquiries to Red China, an unrecognized government, rather than Nationalist China, while acknowledging in the same breath that they would then insist, if Red China agreed to receive them, upon further proceedings to preclude their deportation to the China mainland. A more transparent effort to delay and defeat the operation of a statute cannot readily be imagined. It is familiar doctrine, which hardly needs restating, that a court of equity need not abet such a patently obstructive maneuver. See *Great Lakes Dredge & Dock Co.* v. *Huffman*, 319 U.S. 293, 300; *Eccles* v. *Peoples Bank*, 333 U.S. 426, 431; 6 Moore, *Federal Practice* (2d ed.) 3025 *et seq.*

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for certiorari should be denied.

ARCHIBALD COX,
Solicitor General.
HERBERT J. MILLER, JR.,
Assistant Attorney General.
L. PAUL WININGS,
General Counsel,
CHARLES GORDON,
Deputy General Counsel,
Immigration and Naturalization Service.

JULY 1963.

APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 368–369—October Term, 1962

(Argued June 3, 1963. Decided July 2, 1963)

Docket Nos. 27542, 28121

NG KAM FOOK, APPELLANT

v.

P. A. ESPERDY, AS DISTRICT DIRECTOR OF THE IMMIGRATION AND NATURALIZATION SERVICE, APPELLEE

AL TONG, APPELLANT

v.

P. A. ESPERDY, AS DISTRICT DIRECTOR OF THE IMMIGRATION AND NATURALIZATION SERVICE, APPELLEE

Before: LUMBARD, *Chief Judge*, CLARK, *Circuit Judge*, and BARTELS, *District Judge*.

Appeal from the United States District Court for the Southern District of New York, Charles M. Metzner, Judge. Both appellants appeal from an order in each case granting summary judgment to the appellee, dismissing the complaint.

Affirmed.

Jules E. Coven, New York, N.Y. (Abraham Lebenkoff and Lebenkoff & Coven, on the brief), *for appellants*.

Roy Babitt, Special Assistant United States Attorney, Southern District of New York, New York, N.Y. (Robert M. Morgenthau, United States Attorney, Southern District of New York, on the brief), *for appellee*.

BARTELS, *District Judge*:

Plaintiff Ng Kam Fook (Fook) and plaintiff Au Tong (Tong) have joined in a consolidated appeal involving identical questions, from an order by Judge Metzner in each case, granting summary judgment in favor of the District Director, Immigration and Naturalization Service, New York District, in actions seeking to review the order of the Attorney General directing the deportation of Fook to Hong Kong and the deportation of Tong to the Netherlands.

The question involved in this appeal is the construction of the word "country" as used in Section 243(a) of the Immigration and Nationality Act of 1952 (the Act), (8 U.S.C. § 1253(a)), which sets forth a pattern for deportation of aliens illegally present in the United States. In providing for the mechanics for the enforcement of a deportation order, the section prescribes in succession three priorities for the deportation of an alien, in each of which the word "country" is employed, (1) deportation to a country designated by the alien if the country is willing to accept him; (2) upon failure to receive timely acceptance from the country mentioned in (1), deportation to "any country of which such alien is a subject, national, or citizen if such country is willing to accept him into its territory," and (3) upon failure to receive timely acceptance from the country mentioned in (2), deportation to any one of seven categories of countries

mentioned in the Act within the discretion of the Attorney General without priority as to order.

Fook and Tong arrived in the United States as crewmen, Fook in 1955 and Tong in 1953. Both were born on the mainland of China at the time it was under the control of the Nationalist Government of China, and both are concededly here illegally and subject to deportation. Each declined to designate a country to which he wished to be sent if deported, as provided in the first priority of the statute, thus requiring resort to the second priority. The United States recognizes only the Government of the Republic of China (Nationalist China) with a capital on Formosa as the legal Government of China and as the Government of which these appellants are subject nationals and citizens, see *Rogers v. Chong Fu Chiang*, 280 F. 2d 663 (D.C. Cir.), *cert. denied*, 364 U.S. 891 (1960). Accordingly, after their hearings the Attorney General inquired of the Nationalist Government on Formosa whether these aliens would be accepted by the Government upon deportation and the reply was in the negative. The Attorney General then resorted to the third priority and ordered Fook to be deported to Hong Kong and Tong to be deported to the Netherlands. The appellants claim that they are subject nationals and citizens of the Chinese mainland, which they claim is a "country" as that term is used in the second priority, and that the Attorney General was obligated under the Act to make preliminary inquiry of that Government to ascertain whether they were acceptable to that Government before directing deportation elsewhere.

This Court has held in the past that in construing Section 243(a) of the Act, "The word 'country' has no fixed meaning, and should be construed in accordance with the purpose of the particular legislation."

Chan Chuen v. *Esperdy*, 285 F. 2d 353 (1960). In *United States ex rel. Tom Man* v. *Murff*, 264 F. 2d 926 (2 Cir. 1959), and in *United States ex rel. Leong Choy Moon* v. *Shaughnessy*, 218 F. 2d 316 (2 Cir. 1954), the mainland of China was deemed a "country" for the purpose of deportation under the third priority, the *Man* case holding that such deportation was subject to the condition of a preliminary inquiry of acceptability which, the court added, would not invade the prerogative of the Executive Department. These cases cannot be regarded, however, as holding that the Chinese mainland is a "country," as that term is used in all the other provisions of the Act. When referring to nationality and citizenship of a country, different concepts arise. The term "country," when referring to a foreign country, is ambiguous. "It may be taken to mean foreign territory or a foreign government. In the sense of territory, it may embrace all the territory subject to a foreign sovereign power. When referring more particularly to a foreign government, it may describe a foreign state in the international sense, that is, one that has the status of an international person with the rights and responsibilities under international law of a member of the family of nations * * *." *Burnett* v. *Chicago Portrait Co.*, 285 U.S. 1, 5 (1932). In other words, the different situations envisioned by the Act do not permit an absolutist approach to the definition.

In connection with naturalization and citizenship the dominant consideration is not geographical and in such case it is not unreasonable to construe the word "country" as meaning a foreign state with the rights and responsibilities under international law of a member of the family of nations. This apparently is what the court had in mind when Judge Hand said in the *Man* case in referring to deportation of a Chinese

alien to the mainland under the third priority. "We assume that he cannot be regarded as a 'subject national, or citizen' of the Communist Government, because we do not recognize that as more than a *de facto* government." *United States ex. rel. Tom Man* v. *Murff*, 264 F. 2d 926, 928 (2 Cir. 1959). But the United States does recognize the Government of the Republic of China with a capital on Formosa as the *de jure* Government of China. The courts have accordingly upheld the action of the Attorney General in deporting to Formosa Chinese aliens born on the mainland under the second priority of the Act. See *Lee Wei Fang, et al.* v. *Kennedy*, No. 16996, D.C. Cir., Mar. 25, 1963; *Da Ming Sich* v. *Kennedy*, 297 F. 2d 791 (D.C Cir. 1961), *cert. denied*, 369 U.S. 844 (1962); *Liang* v. *United States Dept. of Justice*, 290 F. 2d 614 (9 Cir. 1961); *Chao-Ling Wang* v. *Pilliod*, 285 F. 2d 517 (7 Cir. 1960); *Rogers* v. *Cheng Fu Cheng, supra; cf., Leong Leun Do* v. *Esperdy*, 309 F. 2d 467 (2 Cir. 1962). This construction of the term "country", as used in the second priority of the Act, is consistent with the purpose of the legislation to facilitate the enforcement of deportation orders and to reduce the number of unenforceable orders, *Rogers* v. *Cheng Fu Cheng, supra*, and it is not inconsistent with a different meaning given the same term elsewhere in the Act, as for instance, in describing a geographical area which an alien may designate for deportation, or an area from which an alien may embark, or in which an alien may be born: See *Delany* v. *Moraitis*, 136 F. 2d 129, 131 (4 Cir. 1943).

In the present proceeding another factor is also important. Assuming, *arguendo*, that the Chinese mainland could be a "country", as that term is used in the second priority of the Act, the appellants have presented no evidence that actually they are subject na-

tionals or citizens of the Communist Government on the mainland. The record is devoid of any evidence whatsoever of their allegiance to this Government which now controls the area. As above stated, Fook and Tong were both born on the mainland of China at the time it was controlled by the Nationalist Government. According to the record, Fook stated that he was an adherent of the Nationalist Government at the time he left and in fact, was travelling on a passport issued by that Government. Tong stated on the record that he did not wish to be sent to a Communist country, which automatically included the Communist Government on the mainland. As observed by Judge Parker in *Delany* v. *Moraitis*, *supra*, "a man's 'country' is more than the territory in which its people live. The term is used generally to indicate the state, the organization or social life which exercises sovereign power in behalf of the people." (*id.* at 130). As used in the Act, "the term 'national' means a person owing permanent allegiance to a state".[1] Clearly, the allegiance of these appellants was not to the Chinese Government on the mainland. Their original allegiance was unquestionably to the Nationalist Government now on Formosa, and the record discloses no evidence of any change in this allegiance. Their "original citizenship is therefore to be presumed to have continued". *Hauenstein* v. *Lynham*, 100 U.S. 483 (1880). The bare allegations of these aliens to the contrary, in the absence of any proof or showing, lack sincerity and are insufficient to cast a substantial doubt upon their actual allegiance to or citizenship of the Nationalist Government on Formosa. It is unnecessary, therefore, to predicate our conclusion solely upon the construction of the word "country", as used in the statute, dictated primarily upon the non-

[1] U.S.C. § 1101 (a) (21).

recognition of the Communist Government which in turn is based upon the theory that a preliminary inquiry might impliedly suggest recognition and thus might embarrass the decisions of the Executive Department as to foreign policies. See Cardozo, Judicial Deference to State Department Suggestions: Recognition of Prerogative or Abdication to Usurper?, 48 Cornell L.Q. 461 (1963).

The Attorney General having complied with the requirements of the Act, the judgment of the District Court is affirmed.

LUMBARD, *Chief Judge*—dissenting.

For the reasons stated in my concurring opinion in *Leong Leun Do* v. *Esperdy*, 309 F. 2d 467, 475, 477–79 (2 Cir. 1962), I would hold that for purposes of the present proceeding, "the Chinese mainland is a country of which an alien may be a subject national or citizen." *Id.* at 478. It seems to me that some agencies of the United States government could, directly or through intermediaries, contact agents of the Communist government without implying recognition. If such a procedure is rejected by the executive branch, then, under the present statute, the alien should not be deported. This area of the law seems to be one which particularly requires legislative attention.

I would reverse the summary judgments of the district court which dismissed the complaint.

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